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Nos. 62 and 73

In the Supreme Court of the United States

OCTOBER TERM, 1959

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 62

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, APPELLANT

v.

UNITED STATES OF AMERICA

No. 73

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 121–133, 480–496, 504–506) are reported in 167 F. Supp. 45, 167 F. Supp. 799, and 168 F. Supp. 880.

JURISDICTION

The complaint filed by the Government charged the defendant with violating Sections 1, 2, and 3 of

the Sherman Act and Section 7 of the Clayton Act. The district court entered judgment on the charge of violating Section 2 of the Sherman Act on November 10, 1958 (R. 74–75), it entered judgment on the charge of violating Section 3 of the Sherman Act and Section 7 of the Clayton Act on January 22, 1959 (R. 85–87), and it entered judgment on the charge of violating Section 1 of the Sherman Act on January 30, 1959 (R 88). On entry of the judgment of January 30, 1959, the prior partial judgments became final. Rule 54(b), F.R.C.P.

Notice of appeal in No. 62 was filed on March 11, 1959 (R. 89), and notice of appeal in No. 73 was filed on March 23, 1959 (R. 92). This Court noted probable jurisdiction of the appeals on June 29, 1959 (R. 746). 360 U.S. 927. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U.S.C. 29.

QUESTIONS PRESENTED

1. Whether the defendant Association's monopolization and attempted monopolization of the Washington milk market by coercive and exclusionary means are immunized from § 2 of the Sherman Act by the Capper-Volstead Act or § 6 of the Clayton Act.

2. Whether the Association's violation of § 3 of the Sherman Act and of § 7 of the Clayton Act, as found by the district court, are within any immunity given by the foregoing statutory provisions.

3. Whether the provision of § 7 of the Clayton Act that its prohibitions are not applicable to transactions consummated pursuant to authority given by the Sec-

retary of Agriculture validates the Association's acquisition of the business and assets of Embassy Dairy, Inc.

4. Whether the relief ordered by the district court was adequate.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, the Clayton Act, and the Capper-Volstead Act are set forth in the Appendix, *infra*, pp. 54–58.

STATEMENT

1. *The district court proceedings.* This is a civil proceeding brought by the United States on November 21, 1956, against the Maryland and Virginia Milk Producers Association, Inc. ("the Association"). The Government's amended complaint charged:

(1) That continuously since about 1930 the Association has attempted to monopolize, and has monopolized, by predatory and exclusionary conduct, trade and commerce in supplying raw milk to dealers in the Washington metropolitan area,[1] in violation of § 2 of the Sherman Act (R. 17–18);

(2) That continuously since about April 1954 the Association and certain co-conspirators have been engaged in a combination and conspiracy to eliminate competition in said area with the Association and with dealers purchasing milk from it: (a) by effecting acquisition by the Association of substantially all the

[1] This area was defined as comprising Montgomery and Prince Georges Counties, Maryland, the District of Columbia, and Arlington and Fairfax Counties and the cities of Alexandria and Falls Church, Virginia (R. 14).

assets of Embassy Dairy, Inc. (a Washington metropolitan area dealer), (b) by obtaining the co-conspirators' agreement not to sell milk in that area for a period of ten years, and (c) by undertaking to force milk producers who had been supplying Embassy to become Association members if they wished to sell their milk to Washington metropolitan area dealers, in violation of §§ 1 and 3 of the Sherman Act (R. 18–21); and

(3) That the effect of Association's acquisition of Embassy's assets has been or may be substantially to lessen competition, or to tend to create a monopoly, in the sale of raw milk to, and the sale of pasteurized fluid milk by, Washington metropolitan area dealers, in violation of § 7 of the Clayton Act (R. 21).

Following pre-trial proceedings (R. 97–120), the filing by the Government of particulars concerning its charge of monopolizing and attempting to monopolize in violation of § 2 of the Sherman Act (R. 35–58, 68–74), and the filing of stipulations that certain depositions and documents would be received in evidence (R. 59, 65–66), the district court decided that it would initially pass upon the affirmative defense pleaded in the Association's answer, namely, that all the activities charged against it were given exemption from the antitrust laws by § 6 of the Clayton Act and the Capper-Volstead Act.

In an opinion rendered on October 16, 1958, the court held that the Association was an agricultural cooperative within the meaning of these statutes (R. 121, 125–126). It further ruled that the statutes give such a cooperative absolute exemption from the anti-

trust laws "as to all of its activities", absent combination or conspiracy with persons not producers of agricultural commodities (R. 131). Under this view of the governing law, the court held that there was no cause of action under § 2 of the Sherman Act and that the § 2 charge should be dismissed, but that the charges of violating §§ 1 and 3 of the Sherman Act and § 7 of the Clayton Act were not within the claimed exemption and should be tried (R. 132–133).

After the court had decided that the charge of violating § 7 of the Clayton Act should be tried first and independently of the remaining Sherman Act charges (R. 175–176, 181), and after trial of the Clayton Act charge, the court on November 21, 1958, rendered an opinion holding that this charge had been established (R. 480–495).[2] The parties then stipulated that the charge of violating §§ 1 and 3 of the Sherman Act should be decided on the evidence introduced on the Clayton Act charge, and the court, after hearing argument, held that the evidence established violation of § 3 (R. 504–506).

The court entered three judgments. The first dismissed the § 2 Sherman Act charge (R. 74–75), the second adjudged violation of § 7 of the Clayton Act and § 3 of the Sherman Act and provided for disvesture of the Embassy assets and business (R. 85–87), and the third dismissed the § 1 Sherman Act charge (R. 88).[3]

[2] The opinion recites that it will constitute the court's findings of fact and conclusions of law (R. 495).

[3] Since the basic prohibitions of § 1 and § 3 of the Sherman Act are the same and since the court had adjudged violation of § 3, the Government consented to dismissal of the § 1 charge (R. 88).

In No. 62 the Association has appealed from the judgment (entered on January 22, 1959) that its acquisition of Embassy violated § 7 of the Clayton Act and § 3 of the Sherman Act. In No. 73 the United States has appealed from the judgment dismissing the § 2 Sherman Act charge, and its appeal also attacks the adequacy of the relief provided by the judgment of January 22, 1959.

2. *The marketing of milk in the Washington metropolitan area.* The milk sold in the Washington metropolitan area as fluid milk is supplied by milk producers (dairy farmers) in Maryland, Virginia, Pennsylvania, and West Virginia (R. 14, 27). These producers sell directly or through an agent to dealers (generally called dairies), who pasteurize and process the milk for immediate delivery and sale to consumers, stores, and other outlets (R. 14, 28). The Association, which is an agricultural cooperative organization composed of nearly 2,000 dairy farmer members primarily located in Maryland and Virginia, acts as the marketing agency for its members and sells most of the milk produced by its members to Washington metropolitan area dealers (R. 13, 485). It supplies about 86% of the fluid milk sold by the dealers in that area, of whom there are about a dozen (R. 486).[4] It supplies substantially all of the fluid milk sold by the three largest dealers (Pl. Ex. 27, R. 572–573), but

[4] According to the Association's own figures covering all sales of fluid milk (other than those made under Armed Services contracts) by Washington metropolitan area dealers, dealers having 89% of these sales obtained 100% (in one instance 99.8%) of their milk from the Association (Pl. Ex. 27, R. 572–573).

Embassy, the fourth largest, having about 9.5% of the fluid milk sales, procured its milk from about 120 dairy farmers who were not Association members (R. 486–487).

The price that dealers pay to the Association depends upon the use to which the milk is put. The highest price is for that resold as fluid milk (Class I). There are much lower prices for milk converted into cottage cheese or cream (Class II) and for milk transformed into by-products such as ice cream and powdered milk (Class III), which is known as surplus milk (R. 485–486). All members, however, receive the same amount per gallon from the Association, representing the average amount per gallon obtained by the Association, after deducting the Association's operating expenses and a deduction to maintain a revolving reserve fund. Accordingly, members directly benefit when Class I sales are maximized and Class III sales are minimized (R. 486; Pl. Ex. 22, R. 551).

3. *The Association's Acquisition of Embassy.* On July 26, 1954, Embassy conveyed its tangible and intangible assets to the Association (R. 490–491). The conveyance was pursuant to a purchase agreement dated May 26, 1954, which fixed the purchase price at $2,940,815, plus the estimated value (determined on closing date to be $861,000) of Embassy's accounts receivable and inventories (R. 586, 589, 595). The purchase represented a cash commitment of at least $4,000,000, consisting of cash payments to the seller

of about $3,800,000 and supplying around $300,000 as working capital for Embassy (R. 544, 562).[5]

The district court found that the price paid by the Association for Embassy's assets "was far in excess of the actual and intrinsic value of the property purchased" (R. 491). In fact, the Association paid, and recognized that it was paying, almost double what the assets were worth, that is, over $2,940,000 for fixed assets having a value of only about $1,600,000 (R. 558).[6] The amount paid in excess of the value of property received was set up on the Association's books of account as "Intangible Assets," composed of "Good Will Purchased" ($530,562.67) and "Unamortized Cost of Non-Competitive Agreement" ($1,000,000) (R. 287–288, 623).[7] Since the acquisition, Embassy has been operated by the Association at a substantial loss (see note 17, *infra*, p. 36).

Two agreements which the Association deemed of great importance were incorporated in the contract for the sale of Embassy's assets and business. One was an agreement by the owner of Embassy (James J. Ward) that for a period of ten years neither he

[5] The Association financed the purchase by borrowing about $3,250,000 ($2,100,000 from the Baltimore Bank for Cooperatives, $750,000 from local banks, $407,000 from it own members) and using $748,000 of its own funds (R. 620).

[6] In an appraisal to determine insurable values, made following the purchase, the insurable value of Embassy's buildings was found to be $642,000, and the maximum insurable value of its machinery and equipment $800,000, or a total of $1,442,000 (R. 605–606).

[7] As of December 31, 1954, the latter item was $958,333.33, but the accountant who had supervised preparation of the Association's balance sheet believed that the original entry had been $1,000,000 (*ibid.*).

nor any dairy presently or thereafter owned by him would engage directly or indirectly in the wholesale or retail sale of milk in the Washington metropolitan area (R. 590–591, 597).[8] The other was an agreement by the seller that it would endeavor to persuade its milk suppliers to furnish their milk to a dairy or dairies covered by the covenant not to compete and to persuade those refusing to do this to become members of the Association (R. 590).

The Association anticipated benefits from the Embassy acquisition sufficient to warrant payment of "an extra million over the physical value of these properties in order to get control of them" (R. 555). These benefits were described in Association "memoranda not intended for public consumption" (R. 487). One anticipated benefit was, in the words of the Association, "Elimination of bootlegging, i.e., bringing in cheap uninspected 'distress' milk from other markets", which, even if not sold as "D.C.-inspected milk" in the District of Columbia, "drains off a demand" for milk sold by the Association's dealer-customers (R. 553). Putting a stop to Embassy's operations was deemed important because its "ability to buy cheap milk both from unlicensed sources and from independent Washington producers [*i.e.*, nonmembers of the Association] has cut into the market structure", taken away sales from the Association's dealer-customers, and reduced the Association's Class I milk sales with a consequent estimated loss in reve-

[8] This agreement appears to be the basis for the Association's balance sheet item labeled "Unamortized Cost of Non-Competitive Agreement" (R. 287).

nue to its members of about $700,000 a year (R. 541–542). The Association further declared that purchase of Embassy "will eliminate a disturbing influence which has been a thorn in the side of the Association for many years" (R. 554). The Association viewed Embassy's "ability to under-buy, therefore under-cut in their bidding", as a particularly disturbing market factor with reference to milk sold by contract bidding for use in various Government installations (R. 542).

The Association observed that it supplies "all Washington Dairies except Embassy" (R. 557), that Embassy "had never cooperated" with the Association "and had always looked to other sources of supply" (R. 555), and that the Association's acquisition of Embassy "has the unqualified support of the dealers in the market and they have given full assurance that they will work 100% with the Association the same as they have in the past" (R. 549).

4. *The decision of the district court.* In holding (R. 492) that the Association's acquisition of Embassy's assets violated § 7 of the Clayton Act because it "inescapabl[y]" "tends to lessen competition" and "tends to create a monopoly," the district court stated (R. 491–492) that the acquisition "tended to lessen competition in the milk industry in the Washington market in more ways than one." It pointed out (R. 491) that many independent producers who had been supplying Embassy "were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status and join the Association";

that the largest single outlet in the Washington metropolitan area for milk produced by nonmembers of the Association was eliminated; that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market and the amount of milk controlled by the Association was increased; and that Embassy was eliminated as a competitive factor in the sale of milk to the Federal Government so that, immediately following the acquisition, milk of Association members constituted 91.7% of such sales, whereas it had previously constituted only 45%. The court concluded (R. 492) that, "Without doubt, the result [of the acquisition] was that the defendant enhanced its dominating position in the market, even though it did not attain complete control."[9]

In subsequently holding, on the basis of the record made at the trial of the § 7 charge, that the Embassy acquisition also violated § 3 of the Sherman Act, the court found (R. 504–506) that the result of the acquisition "was a foreclosure of competition, in respect to Government contracts and in respect to purchases of milk from milk producers"; that the transaction "was entered into with the intent and purpose of restrain-

[9] The Government also had challenged, in an amendment to the complaint (not printed), the Association's acquisition in December 1957 of the stock of Wakefield Dairy. The court held (R. 495) that the acquisition did not violate Section 7. It ruled (*ibid.*) that since Wakefield was then "hopelessly insolvent," "deeply in debt" and "on the brink of bankruptcy," the acquisition was governed by the rule of *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291, that the "acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act." We do not challenge that ruling.

ing trade"; and that the "statutory immunity accorded to agricultural cooperatives" was not applicable.

SUMMARY OF ARGUMENT

The primary question in these cases is the extent to which an agricultural cooperative is immunized from the antitrust laws by the Capper-Volstead Act or § 6 of the Clayton Act. The district court viewed these statutory provisions as conferring complete immunity save in the single situation where a cooperative combines or conspires with outsiders, *i.e.*, those not agricultural producers. The district court, applying this test, dismissed the allegations of the complaint charging violation of § 2 of the Sherman Act and, on the other hand, sustained the allegations charging violation of § 3 of that Act and § 7 of the Clayton Act, and also held, after trial, that the evidence established these violations. Each of these holdings is presently in issue.

I

A. Plainly § 6 of the Clayton Act confers no immunity applicable to the antitrust violations here involved. The section merely gives labor unions and agricultural associations protection against dissolution as illegal combinations in restraint of trade, but no antitrust violation alleged in the present complaint or found by the district court is even remotely rested on the view that the association is in itself an illegal combination in restraint of trade.

B. The Capper-Volstead Act does not confer on agricultural associations any blanket, absolute immunity to monopolize (or to restrain) trade. The Act was

designed to strengthen the bargaining position of those engaged in agricultural production by authorizing them to market their product collectively through membership associations having the attributes of a single legal entity. This is the authorization given by § 1 of the Act. Section 2, which permits the Secretary of Agriculture to institute an administrative proceeding if activities authorized under § 1 result in the price of an agricultural product being "unduly enhanced", is merely a "qualification" of the § 1 authorization, is not "a substitute for the provisions of the Sherman Act", and confers upon the Secretary no primary jurisdiction respecting violation of that Act by agricultural associations. *United States* v. *Borden*, 308 U.S. 188, 206.

The collective marketing through an association operated for the "mutual benefit" of its members, as authorized by § 1 of the Act, legitimates no more than securing such control over local supply as results from voluntary membership in an association by the local producers or most of them. Any control over supply or price obtained by excluding non-member producers from the market, by predatory pricing to achieve this end, or by combining with others to obtain a control over supply or price, which the association could not achieve if it acted singly in collectively marketing the product of its members, transcends the authorization of § 1 and thereby becomes subject to antitrust law prohibitions. This was the effect of the statute as intended by Congress.

In the House, the Committee report on the bill states that if associations which the bill authorizes

"shall do anything forbidden by the Sherman Anti-trust Act, they will be subject to [its] penalties", and that the bill's purpose was to put these associations on a parity with business corporations but not to place them "above the law". This was also the holding in *Borden*, where the Court held that a combined attempt by an agricultural association and various outside interests to control supply and price "finds no justification in § 1" of the Capper-Volstead Act. 308 U.S. at 205. The holding in *Borden* was, not that an authorization (and hence immunity) given by the Capper-Volstead Act had been lost by reason of agreement with outsiders, but that the authorization of the Act did not extend to the kind of trade-restraining and monopolistic practices charged against the association by the indictment.

We submit that the monopolization and attempted monopolization alleged in the complaint, as further particularized by the Government—cutting off access to the market by competitors (non-member producers) and a general foreclosure of competition, by boycotting, refusals to sell, predatory price cutting, credit leverage, etc.—goes beyond any supply-control position implicitly authorized by the Capper-Volstead Act and therefore, like the *Borden* situation, goes beyond any immunity given by that Act. This has been the consistent interpretation of the statute by lower federal courts.

C. The Association's acquisition of Embassy was not a transaction immunized by Capper-Volstead from § 3 of the Sherman Act. The acquisition of a milk dealer does not necessarily exceed the permissible lim-

its of Capper-Volstead. But, on the facts found by the district court, the acquisition—at a price far in excess of Embassy's value—was consummated in order to exclude rival producers from the market and to eliminate a dealer troublesome to the Association's dealer-customers, "with the intent and purpose of restraining trade" and with the effect of "a foreclosure of competition" in bidding on Government contracts and purchases of milk from milk producers.

In the case of a business corporation, such conduct would be in unreasonable restraint of trade, prohibited by the Sherman Act. Since Congress did not intend that the Capper-Volstead Act give agricultural associations a privileged status with reference to the antitrust laws, but simply that they should be placed on a parity with business corporations, the Association's acquisition of Embassy must be deemed not within any Capper-Volstead Act privilege. And the Association has not even contested the court's holding that the acquisition, if not thus privileged, violated § 3 of the Sherman Act.

Equally clearly, the acquisition, if not immunized by Capper-Volstead, violated § 7 of the Clayton Act, which makes it unlawful for a corporation to acquire assets of another corporation where, "in any line of commerce", the effect of the acquisition "may be substantially to lessen competition, or to tend to create a monopoly".

II

We submit that the Association's contention that § 7 of the Clayton Act excludes acquisitions by agricultural cooperatives from the prohibitions of that sec-

tion is without substance. The Association is clearly a corporation "subject to the jurisdiction of the Federal Trade Commission." See the specification of that jurisdiction in § 11 of the Clayton Act.

Nor are agricultural associations excluded from § 7 by virtue of the last paragraph of the section, which exempts transactions consummated pursuant to authorization by certain administrative agencies (including the Secretary of Agriculture) under statutory power to grant such sanction. The last paragraph is inapplicable because the Secretary neither has statutory power to approve the acquisition of corporate assets by an agricultural cooperative, nor had he, as to the Association's acquisition of Embassy, purported to exercise this power. The Association's suggested interpretation of the last paragraph as an outright exclusion of all agricultural cooperatives from § 7, irrespective of the Secretary's approval of or power to approve an acquisition, is inconsistent with the language of the paragraph, and is also contrary to the intent of Congress as indicated by legislative history.

In any event, the Association's argument would not validate the Embassy acquisition. For the asserted immunity would be limited to § 7; the acquisition, however, was also held to violate § 3 of the Sherman Act.

III

A trial court, having determined that an acquisition violates the antitrust laws, is obligated to order relief which will undo, to the extent reasonably possible, the wrong that has been done. In this case it is essential to effective relief that the judgment provide for a

divestiture of Embassy's business and assets
such terms that Embassy will come under new
ship as a viable business entity, able to surviv
to compete effectively with the well established
presently operating in the Washington market
Government submits that the district court,
gave only hasty and almost cursory considera
the question of relief, erred in failing (1) to requ
Association to divest not only the business and as
Embassy which it acquired on July 26, 195
"replacements therefor," but also the modern
chinery and other assets which the Associatio
used in the operation of Embassy since that
(2) to prohibit the Association from operatin
other dairy pending divestiture of Embassy an
a reasonable period thereafter; (3) to enjoi
Association, for a limited period after divest
from acquiring another dairy in the area, excep
the court's permission upon a showing by the As
tion that such acquisition would not substan
lessen competition or tend to create a monopoly
(4) to grant the Government visitation rigl
examine the Association's books and records.

ARGUMENT

I. SECTION 6 OF THE CLAYTON ACT AND THE CA VOLSTEAD ACT DO NOT IMMUNIZE THE ASSOCIA VIOLATION OF SECTION 2 OF THE SHERMAN AC CHARGED IN THE COMPLAINT, OR ITS VIOLATIO SECTION 3 OF THAT ACT AND SECTION 7 OF THE TON ACT, AS FOUND BY THE DISTRICT COURT

The district court, after holding that § 6 o
Clayton Act and the Capper-Volstead Act, sing
together, exempt an agricultural cooperative fro

prohibitions of § 2 of the Sherman Act, entered a judgment on November 10, 1958, dismissing the allegations of the complaint which charged the Associations with monopolizing and attempting to monopolize interstate commerce in violation of § 2. The Government's appeal from that judgment raises the issue of whether the foregoing statutory provisions give an agricultural cooperative untrammeled license to engage in the kind of monopolization and attempted monopolization of interstate commerce charged in the complaint. Unless the cooperative has such immunity, dismissal of the charge without affording the Government opportunity to establish its allegations was error. Furthermore, since the Government had filed a particularization of its monopolization charges, the full breadth of the charges, as particularized, must be within the asserted immunity if the judgment of dismissal is to stand.

The practical importance of the Government's § 2 charge is clear. As we shall show (see *infra*, pp. 29–32), the monopolization charge involves numerous coercive and predatory practices through which, it is alleged, the Association unlawfully obtained and maintained its monopoly power. If the Government is permitted to try its § 2 Sherman Act charge and if victorious on trial thereof, it will seek, and presumably will obtain, injunctive provisions against these predatory practices that would go far beyond the relief necessary and appropriate to cure the violations already found by the district court.

The Association, in appealing from the judgment of January 22, 1959, that it violated § 3 of the Sher-

man Act and § 7 of the Clayton Act, raises the question of whether, on the facts found by the district court, the conduct held to be violative of these sections is withdrawn from their prohibitions by § 6 of the Clayton Act and the Capper-Volstead Act. While, therefore, both appeals are concerned with the immunizing effect of these statutory provisions, the factual framework of reference as to § 2 of the Sherman Act is the particularized allegations of the complaint, but as to § 3 of that Act and § 7 of the Clayton Act is the district court's findings.

A. SECTION 6 OF THE CLAYTON ACT DOES NOT IMMUNIZE THE VIOLATION OF SECTION 2 OF THE SHERMAN ACT ALLEGED IN THE COMPLAINT, OR THE VIOLATION OF SECTION 3 OF THAT ACT AND SECTION 7 OF THE CLAYTON ACT FOUND BY THE DISTRICT COURT

Section 6 of the Clayton Act, unchanged since its enactment in 1914, provides that nothing contained in the antitrust laws shall be construed to forbid the "existence and operation" of labor or agricultural organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid individual members of such organizations from "lawfully carrying out the legitimate objects thereof"; nor shall such organizations or their members be held to be "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." By the plain words of the section, the only immunity from the antitrust laws which it gives to labor unions and agricultural cooperatives is that these organizations shall not be deemed to be illegal combinations in restraint of trade. Both the House and Senate reports on the bill state that the purpose of the section was to forestall

the fear expressed by the president of the American Federation of Labor that the antitrust laws would or might be interpreted as meaning that such organizations are, by their very existence and essential objectives, illegal combinations in restraint of trade, subject to dissolution under these laws (H. Rep. 627, 63d Cong., 2d Sess., 14–16; S. Rep. 698, 63d Cong., 2d Sess., 10–12, 46).

Although § 20 of the Clayton Act provides that a wide range of labor union activity, such as strikes, boycotts and peaceful picketing, shall not, when incident to a labor dispute, "be considered or held to be violations of any law of the United States", this Court has consistently held that the Clayton Act does not manifest "a congressional purpose wholly to exempt labor unions" from the antitrust laws, and it was § 20 of the Act, rather than § 6, which was regarded as laying some foundation for a claim of total immunity. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 468–474; *United States* v. *Hutcheson*, 312 U.S. 219, 229–234; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 803–805. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503–507, 512.

In the instant case the antitrust violations alleged in the complaint or found by the district court are not even remotely rested upon the view that the Association is in itself an illegal combination in restraint of trade. We submit, therefore, that the antitrust violations which are in issue are clearly not within any immunity given by § 6 of the Clayton Act.

B. THE CAPPER-VOLSTEAD ACT DOES NOT IMMUNIZE THE VIOLATION OF SECTION 2 OF THE SHERMAN ACT ALLEGED IN THE COMPLAINT

(1) The Capper-Volstead Act Does Not Confer on Agricultural Cooperatives Absolute, Blanket Immunity with Respect to Violation of Section 2 of the Sherman Act

Section 1 of the Capper-Volstead Act (*infra*, pp. 56–57) provides that producers of agricultural products may act together in corporate or non-corporate associations, operated for the mutual benefit of the member producers, "in collectively processing, preparing for market, handling, and marketing" their products in interstate and foreign commerce. The section also authorizes such associations to have marketing agencies in common and to "make the necessary contracts and agreements to effect such purposes".

Section 2 of the Act (*infra*, pp. 57–58) provides that if the Secretary of Agriculture believes that any such association "monopolizes or restrains" interstate trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof", he shall serve upon the association a complaint stating his charge and, if he finds after a hearing that there has been such monopolization or restraint of trade, he shall issue an order directing the association to "cease and desist" therefrom. The section confers upon the several district courts jurisdiction to enter a decree enjoining violation of the Secretary's order, or a decree modifying or setting aside the order, and provides that the Department of Justice shall have charge of the enforcement proceeding.

United States v. *Borden Co.*, 308 U.S. 188, 206, held that since § 2 of the Capper-Volstead Act "does

not cover the entire field of the Sherman Act", and "contains no provisions giving immunity from the Sherman Act in the absence of a proceeding by the Secretary", the section does not confer upon the Secretary primary jurisdiction with respect to violation of the Sherman Act by agricultural cooperatives. The Court declared that "the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1", and that the § 2 procedure was not intended to be "a substitute for the provisions of the Sherman Act." [10]

The unanimous decision in *Borden*, which this Court has never subsequently qualified, finds full support in legislative history. The statute as enacted is substantially in the terms reported by the House Judiciary Committee. The report of that Committee shows that the major purpose of Congress was to permit farmers to pool their product for marketing purposes, and to give associations utilized for this pooling the privileges and attributes of a single legal entity so that they could operate on a parity with the

[10] In *U.S. Alkali Assn.* v. *United States*, 325 U.S. 196, 209–210, this Court said that in *Borden* it had "rejected the contention that the Capper-Volstead Act gave to the Secretary 'exclusive jurisdiction' to determine in the first instance whether the acts of the cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act"; and that it had there held that "neither the language nor the structure of the Capper-Volstead Act indicated a Congressional purpose to make the procedure by the Secretary, which it established, either a substitute for or a prerequisite to a suit by the United States under the Sherman Act."

ordinary stock corporation. The Committee's report states (H. Rep. 24, 67th Cong., 1st Sess., 2):

> Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

To the same effect, the report said (*ibid.*):

> While this bill confers on farmers certain privileges, it can not properly be said to be class legislation. Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. * * *

The Committee believed that there "is no reason to fear monopoly from farm associations", but it said that if any such association "should monopolize or restrain trade so as to unduly enhance the price of any agricultural product ample provision is made in

the bill [by § 2] to protect the public" (*id.* 3). And the Committee stated, specifically and unequivocally, that it was not the intention to immunize agricultural cooperatives from the antitrust laws. It said (*ibid.*):

> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

The Senate Judiciary Committee reported the House bill with an amendment which deleted § 2 of the bill and substituted the declaration: "Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly;" and the Committee interpreted the House bill as authorizing cooperatives to "establish a monopoly", in the sense that it would be permissible for all producers in a particular locality to become members of a cooperative and to market exclusively through it (S. Rep. 236, 67th Cong., 1st Sess., 1–2).[11] Although the Senate rejected the Committee's amendment (62 Cong. Rec. 2280–2281), such rejection means, at most, that Congress intended to permit this kind of "monopoly", and, in the face of the House Committee report (see *supra*, pp. 23–24), the rejection plainly does not show

[11] Section 1 of the Act authorizes agricultural producers to "act together" in associations in "collectively" marketing their product, and it does not limit the number or proportion of producers who may so act together.

Congressional intention to sanction monopolization of any other kind or form. In *April v. National Cranberry Association*, 168 F. Supp. 919, 922–923 (D. Mass.), the court so read the legislative history, and expressly disagreed with the holding by Judge Holtzoff in the instant case that, apart from conspiracy or combination with persons not agricultural producers, an agricultural cooperative is "entirely exempt" from the antitrust laws "as to all of its activities".

The teaching of the legislative history, therefore, is that agricultural cooperatives were given only a limited immunity from § 2 of the Sherman Act, namely, the right to obtain a "monopoly" in the colloquial sense of controlling the entire source of supply in a particular area. And this Court's decision in *Borden* is dispositive of the Association's contention (J. St. No. 62, p. 13) that, "absent participation in a combination or conspiracy, Section 2 of the Capper-Volstead Act was designed to provide the exclusive procedure by which antitrust remedies could be brought to bear upon cooperative activity adversely affecting competition." The Court in that case expressly rejected the trial court's conclusion that § 2 of the Capper-Volstead Act vests in the Secretary of Agriculture "an exclusive jurisdiction" with respect to agricultural cooperatives and that, "until the Secretary acts," prosecution under the Sherman Act is barred. 308 U.S. at 205. The Court held that § 2 simply makes provision for corrective administrative action when conduct permissible under § 1 results in undue enhancement of price. It said that the procedure under § 2 "was intended merely as a *qualification of the authorization given* to cooperative agricultural producers

by § 1, so that if the collective action of such producers, *as there permitted,* results in the opinion of the Secretary [of Agriculture] in monopolization or unduly enhanced prices, he may intervene and seek to control *the action thus taken under § 1"* (emphasis supplied). *Id.* 206.

The opinion in *Borden* does not suggest that § 1 of the Capper-Volstead Act confers a blanket immunity aside from the single circumstance that the cooperative conspires with outsiders, *i.e.,* those who are neither agricultural producers nor associations thereof. The question here pertinent which was before the Court in *Borden* was whether the indictment stated a cause of action under § 1 of the Sherman Act as against an agricultural cooperative, in view of possible immunity therefrom given by the Capper-Volstead Act. The indictment charged that an agricultural cooperative, major distributors of milk and their allied groups, labor officials, municipal officials, and others, had conspired to fix non-competitive prices to be paid to "all" producers by "all" distributors for "all" fluid milk produced in four midwestern states and shipped to Chicago; to fix non-competitive prices for the sale by "the distributors" in Chicago of fluid milk shipped into the city from the states in question; and to limit, control, and obstruct the supply of fluid milk moving into the city from these states. 308 U.S. at 191, 194.

This Court, dealing with the application of the Capper-Volstead Act to the facts of the case, held that the right of agricultural producers, given by § 1, to unite in marketing their products and to make the

contracts necessary for that collaboration, "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise" (308 U.S. at 204–205); that such a "combined attempt * * * to control the market finds no justification in § 1" (*id.* 205); and that "§ 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment" (*id.* 206). The Court thus rested its conclusion, not on the precise terminology of § 1, but on the more basic ground that the conduct charged could not reasonably be regarded as within ends which the Capper-Volstead Act intended to legitimate.

We submit that it is inconsistent with the Court's reasoning to view agreement with an outsider—and "conspiracy" is simply an agreement which is illegal—as the sole circumstance under which a cooperative transcends the authority conferred by § 1 of the Capper-Volstead Act. However, in any event, the issue in *Borden* was not loss, by reason of agreement with outsiders, of an immunity given by the Act, but whether the conduct charged came within any immunity. The illegality found by the court was not agreement or "conspiracy" with outsiders, but engaging in conduct which was not essential to a cooperative's purposes and which, as to an ordinary business corporation, is clearly banned by the Sherman Act. The essential holding was that the Capper-Volstead Act does not authorize the kind of trade-restraining and monopolistic agreement with outsiders charged in the indictment.

Here, as in *Borden*, the problem is to accommodate two Congressional policies embodied in different statutes, the one seeking to preserve a competitive business economy and the other to obtain better returns for farmers through the medium of collective marketing.[12] Cf. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806. The problem is to determine "how far Congress intended activities under one of these policies to neutralize the results envisioned by the other". And this determination is to be made with due regard for the rule that any exemptions from the antitrust laws to be implied from provisions of the Capper-Volstead Act are "special exceptions to a general legislative plan", that is, the basic Sherman Act provisions which have governed interstate trade since 1890. See *id.* 809.

In the light of the foregoing discussion of the Capper-Volstead Act, its legislative history, and the *Borden* decision, we turn to the question, discussed below, whether the Association's monopolization and attempted monopolization of a part of interstate commerce, as charged in the complaint, goes beyond any supply-control position implicitly authorized by the Capper-Volstead Act.

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[12] On May 26, 1959, the Secretary of Agriculture, acting pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, *et seq.*), issued a milk marketing order for the Washington area (24 F.R. 4331–4338). This order, which is still in effect, fixes minimum prices to be paid by each "handler" (operator of a milk processing plant) for milk received from any producer or Capper-Volstead cooperative and marketed in the defined Washington, D.C., marketing area (*id.* 4331–4332, 4335).

(2) The Capper-Volstead Act Does Not Authorize, and Therefore Does Not Immunize from the Antitrust Laws, the Monopolization and Attempted Monopolization Charged in the Complaint

The complaint charged that the Association had done certain things in effectuating monopolization and attempted monopolization of the milk supply in the Washington metropolitan area (R. 17). Among the acts of effectuation so charged were:

> b. Excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers [*ibid.*].

As the above is particularized (R. 35–36, 38), the Association, among other things, attempted to arrange in the period 1940–1942 that producers supplying Embassy (who were not Association members) "switch" to the Baltimore market; attempted to prevent transportation by truck of milk of non-member producers; attempted to exclude a cooperative association of milk producers as a supplier of milk in the Washington area; acquired the assets of Embassy and arranged that the producers supplying it be diverted from the Washington market or absorbed into the Association; purchased a dealer (Richfield Dairy) in order to preclude it from being an outlet for milk supplied by others (R. 39–40, 72).

> e. Threatened and under[took] diverse actions to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant [R. 18].

The particularization of this charge includes: use of a dealer's indebtedness to the Association in order

to obligate him to purchase the Association's milk; sale to a dealer on a price basis contravening the Association's established price basis in order to stop the dealer's purchases from non-member producers; refusing to sell to a dealer unless an affiliated dealer purchased from the Association; use of a boycott by Association members to compel a dealer to purchase from the Association (R. 41–42).

g. Threatened and engaged in predatory pricing [R. 18].

The particularization of the above charge includes: sale of milk to dealer-customers at reduced prices in order to "break" Embassy; threatening to sell to dealer-customers below prevailing prices to take business from Embassy unless it purchased from the Association; sale of milk below prevailing prices to "cooperating" dealer-customers to take business away from independent dealers; threatening to reduce prices to dealer-customers for resale under Government contracts in order to prevent an independent dealer from successfully competing for such contracts (R. 43–44).

k. Eliminated and attempted to eliminate competition with its dealer-customers by dealers purchasing milk from others than the defendant [R. 18].

The particularization of the charge includes: refusing to sell to a dealer (High's Dairy) on the ground that it sold milk at retail prices below those charged by the Association's dealer-customers; sale of milk below prevailing prices to "cooperating" dealer-customers for use in taking business from "non-cooperating" dealers; attempting to induce a dealer to raise its retail prices; obtaining in 1954 covenants

and agreements not to sell milk in the Washington metropolitan area (R. 57).

We submit that in at least two respects the monopolization charges are beyond the ambit of any Capper-Volstead Act authorization. The first respect involves the allegations respecting exclusion or attempted exclusion from the market of non-member producers. The Capper-Volstead Act permits producers to market collectively for their "mutual benefit" through a membership association, but does not thereby sanction use by the association of any dominant market position which it obtains by reason of having been selected by most of the local producers as their sales agent, to cut off the normal market outlet of non-member producers, and confront them with the choice of being shut out of this outlet or becoming members of the association. No word or provision of the Capper-Volstead Act suggests that an agricultural cooperative, once organized, is empowered to coerce producers to become members or to market through it.[13] Accordingly, when, as here, a cooperative uses a position of market dominance[14] to exercise such coercion,

[13] Indeed, in the debate on the bill the producers' freedom of choice was emphasized. Senator Kellogg, the floor leader of the bill, said that those who chose not to join an agricultural association "ought to be allowed to stay out and to sell their products individually or collectively or in any way they please" (62 Cong. Rec. 2267). Senator Walsh, chairman of the Committee which reported the bill, said that formation of an association would not bar formation of others, that if "farmers desire to organize into 20 different associations, they will have a perfect right to do so" (*ibid.*).

[14] The Association unquestionably had a dominant market position. In passing upon the validity of the complaint's monopolization charges, the allegations of the complaint are controlling, and the complaint alleged that during 1955 the Asso-

the Capper-Volstead Act does not shelter it against the prohibitions of the Sherman Act.

The second major respect in which the Association's conduct exceeded any authorization implicit in § 1 of the Capper-Volstead Act involves various coercive acts—boycotting, refusals to sell, predatory price cutting, credit leverage—in order to injure or destroy the business of dealers who did not purchase, or did not purchase exclusively, from the Association.

Existence of power "to exclude competition when it is desired to do so", when coupled with purpose or intent to exercise this power, is itself a violation of § 2 of the Sherman Act. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809, 811, 814. It is "unreasonable, *per se,* to foreclose competitors from any substantial market". *International Salt Co.* v. *United States,* 332 U.S. 392, 396. And "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States* v. *Griffith,* 334 U.S. 100, 107.

We assume that the Capper-Volstead Act permits an agricultural association to obtain a degree of control over supply which, in the case of an ordinary corporation, might constitute unlawful monopolization—provided such control results solely from the volun-

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ciation supplied 92% of the milk sold to Washington metropolitan area dealers (R. 14). We also note that the district court found that, prior to the Embassy acquisition, the Association supplied 86% of such milk (R. 486).

tary act of local producers in becoming members of the association. But the Act clearly does not authorize use of this monopoly position "to beget monopoly" in the retail market in which its purchasers resell, or to expand its own "empire" by coercive or exclusionary means. Cf. *Griffith, supra,* 334 U.S. at 108.

In the present case the Association, controlling some 90% of the milk supply, engaged in predatory and coercive practices to expand its dominant position and to exercise a large degree of control over the retail market in which the purchasers from it resell. Furthermore, when the Association reduced its price to "cooperating" dealers, in order that they in turn reduce their resale price in particular transactions or types of transaction, for the purpose of taking business away from "non-cooperating" dealers, the Association and the cooperating dealers were, in effect, jointly establishing the level of resale prices. It has long been recognized that a seller of goods may not lawfully set resale prices by agreement express or implied. *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U.S. 373, 404; *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U.S. 441, 452–453; *United States* v. *Bausch & Lomb,* 321 U.S. 707.

The decided cases fully support our view that any immunity from the antitrust laws given by Capper-Volstead does not embrace monopolization achieved by means involving restraints of trade of a kind ordinarily cognizable under § 1 of the Sherman Act. In *April* v. *National Cranberry Association,* 168 F. Supp. 919, 923 (D. Mass.), the court (Judge Aldrich) said:

> Particularly I can think of no purpose to be served by permitting cooperatives to use unfair methods to put competitors out of business. To permit this would award agricultural cooperatives a very substantial "privilege or special favor," contrary to the bill's announced purpose and the disclaimers of its sponsors. In the absence of specific language in the act to the contrary, I hold that * * * at least it [Capper-Volstead Act] did not make lawful purely predatory practices seeking to monopolize * * *.

In *Cape Cod Food Products* v. *National Cranberry Association,* 119 F. Supp. 900, 907 (D. Mass.), the court (Judge Wyzanski) in its charge to the jury said that a Capper-Volstead cooperative does not violate the antitrust laws when it acquires even a 100% position in the market if this is achieved solely through "cooperative purchasing and cooperative selling", but that seeking to secure a dominant share of the market "through a restraint of trade which was prohibited, or through a predatory practice, or through the bad faith use of otherwise legitimate devices" would be a prohibited monopolization.

In *Gulf Coast Shrimpers & Oystermans Ass'n* v. *United States,* 236 F. 2d 658, 665 (C.A. 5); certiorari denied, 352 U.S. 927, the court held that a fishermen's association exceeded any privilege or exemption granted by the Fishermen's Collective Marketing Act [15] when it undertook "not simply to fix the prices demanded by its members, but to exclude from the mar-

[15] The pertinent provisions of the Act (15 U.S.C. 521) are identical with those of § 1 of the Capper-Volstead Act.

ket all persons not buying and selling in accordance with its fixed prices." [16]

C. THE CAPPER-VOLSTEAD ACT DOES NOT IMMUNIZE THE VIOLATION OF SECTION 3 OF THE SHERMAN ACT OR THE VIOLATION OF SECTION 7 OF THE CLAYTON ACT FOUND BY THE DISTRICT COURT

(1) The Sherman Act Section 3 Violation

We recognize that the Capper-Volstead Act, by authorizing agricultural associations to engage in collective "processing" and "marketing", and to have "marketing agencies", does not limit the authority conferred to initial sale of agricultural products, but includes, for example, the processing and marketing functions performed by a milk dealer, who processes and acts in part as a middleman and in part as a retailer selling to ultimate consumers. We also assume that an association does not necessarily exceed the statutory authorization if, instead of gradually building up its own dealer organization, it acquires the assets and business of an existing dealer.

The Embassy acquisition was thus not beyond the purview of the Capper-Volstead Act merely because it was the acquisition of a milk dealer. However, we do contend that it was beyond such purview because of the purposes and effect of the particular acquisition. The district court found as a fact that it "was entered into with the intent and purpose of restraining trade" (R. 505), and it found as a fact that "the result of the [acquisition] was a foreclosure of competition, in respect to Government contracts and in re-

[16] *United States* v. *Dairy Co-op Ass'n*, 49 F. Supp. 475 (D. Ore.), is not a contrary authority since the decision was not rested on the Capper-Volstead Act but solely on § 6 of the Clayton Act.

spect to purchases of milk from milk producers" (R. 504–505). Indeed, the evidence makes it abundantly clear that the Embassy acquisition was motivated by considerations other than a desire on the part of the Association that it secure for its members the profits incident to conducting the business of a dealer. The Association was willing and eager to pay more than $1,000,000 above the value of the assets acquired (*supra*, p. 8), and without regard for the actual earnings of the business.[17]

The purposes of the acquisition avowedly were wholly anticompetitive and monopolistic—to decrease the supply of milk in the local market, to increase the proportion thereof controlled by the Association, to increase the Association's membership (by what amounted to coercion), to eliminate a price cutter and thereby stabilize retail prices, and to eliminate or decrease price competition in bidding for Government contracts (*supra*, pp. 9–10). The Association's secretary-treasurer, in writing to the secretary-manager of the Michigan Milk Producers' Association more than six months after the Embassy acquisition, stated that the Association felt compelled to buy Embassy "for self protection"; that Embassy's ac-

[17] Embassy's 1952–1954 net income (before taxes) averaged under $80,000 (R. 627). To acquire the business, the Association paid nearly $4,000,000 (*supra*, p. 7), and a 5% return on $4,000,000 is $200,000. Moreover, the Embassy business had been conducted upon the basis of buying milk at "cheap" prices, which the Association intended to stop. In fact, the Embassy business, following acquisition by the Association, has resulted in substantial operating losses—about $388,000 for the last five months of 1954, about $562,000 for 1955, and about $412,000 for 1956 (R. 628).

tivities in the Washington market had been such that "everyone in the distributing field would be happy to have them out of the market"; that the acquisition gave the Association an additional outlet for a sizable amount of milk and "has improved market conditions"; that he has "never been entirely sold on the idea of producer organizations getting into the distributing end of the business", and would "strongly recommend" that this be done only where an outlet for a sizable amount of milk would be obtained by eliminating an "independent buyer" (R. 625–626).

If the Capper-Volstead Act immunizes the Embassy acquisition—where an agricultural association enters upon a field of distribution new to it, not as an opportunity to earn profits as a distributor, but to remove from the market rival agricultural producers and to eliminate a competitor troublesome to its customers—the Act gives to such an association a privilege to violate the antitrust laws denied to ordinary trading corporations, and gives a privilege which is not necessary to effectuate the collective marketing authorized by the Act. Since Congress denied that it intended to give Capper-Volstead associations such a privileged status (*supra*, pp. 23–25), the Association's immunity claim must be rejected.

The Association's appeal attacks the district court's holding—that the Embassy acquisition violated § 3 of the Sherman Act—solely upon the ground of error in rejection of the Association's immunity claim, and the appeal raises no question of error in this holding aside from rejection of the immunity claim (R. 90–

91). Nevertheless, we point out that a contract, combination or conspiracy to acquire the business of another is illegal under § 1 of the Sherman Act (which is the parallel of § 3) if the effect of the acquisition is "to unreasonably restrict the opportunities of competitors to market their product", and "even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act". *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 524, 525. In *Times-Picayune* v. *United States*, 345 U.S. 594, 614, the Court reiterated that contracts and agreements are within the prohibitions of Sherman Act § 1 "if unreasonable restraint was either their object or effect".

(2) *The Clayton Act Section 7 Violation*

The Capper-Volstead Act does not explicitly authorize an agricultural association to acquire a company engaged in one or more steps in distribution, *i.e.*, a company doing business as a jobber, wholesaler, and/or retailer. Assuming *arguendo* that there may be circumstances in which the Capper-Volstead Act implicitly sanctions such an acquisition, as being "necessary" to effectuate the collective-marketing purposes of a Capper-Volstead association,[18] in the case of the Embassy acquisition the district court's findings and the evidence negative any valid relationship

[18] These circumstances might be a purpose to perform the function of distribution more efficiently than existing distributors or a purpose to share in the normal profits of the business of distribution.

between the acquisition and furtherance of the collective marketing authorized by the Act (*supra*, pp. 8–11). They show, instead, an acquisition designed to exclude competitors from the market—in short, "deliberate, calculated purchase for control." [19]

To repeat certain salient facts, the Association, already having about 86% of the market, acquired Embassy, which had about 9.5% of the market and which obtained its milk from non-members of the Association, so-called "independent" producers (R. 486–487). An avowed objective of the acquisition was to eliminate Embassy as a market outlet for the Association's competitors, the non-member producers selling milk to Embassy (*supra*, pp. 9–10), and the acquisition's necessary consequence was to foreclose some 95% of the market to competitors. This market foreclosure cannot, we submit, be deemed "necessary" for effectuating the voluntary, not coerced, collective marketing authorized by the Capper-Volstead Act (*supra*, pp. 31–32, 34).

As indicated above, the Embassy acquisition is not within any immunity given by the Capper-Volstead Act. Absent such immunity, the Embassy acquisition, if subject to § 7 of the Clayton Act, clearly violates the section, which makes it unlawful for a corporation engaged in interstate commerce to acquire the assets of another corporation so engaged "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[19] See *United States* v. *Reading Co.*, 253 U.S. 26, 57; *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227.

II. THE PROVISION OF SECTION 7 OF THE CLAYTON ACT THAT ITS PROHIBITIONS ARE NOT APPLICABLE TO TRANSACTIONS CONSUMMATED PURSUANT TO AUTHORITY GIVEN BY THE SECRETARY OF AGRICULTURE DOES NOT VALIDATE THE EMBASSY ACQUISITION

The Association contends that the Embassy acquisition comes within the last paragraph of § 7 of the Clayton Act and is therefore exempted from the section. The last paragraph was added by the Act of December 29, 1950, which materially amended § 7 in other respects. The paragraph provides:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Acceptance of this contention, however, would not validate the acquisition. For the district court held that the acquisition violated not only Section 7 of the Clayton Act, but also Section 3 of the Sherman Act, and except for its exemption claim, the Association does not challenge the latter ruling (R. 90–91). By its terms, however, the last paragraph of Section 7 only confers immunity from the prohibitions of "this section," *i.e.*, Section 7 of the Clayton Act, and gives no Sherman Act immunity.

In any event, we submit that the district court correctly rejected the contention that the last paragraph of Section 7 confers Clayton Act immunity upon the Embassy acquisition. The district court so ruled on two grounds, either of which is decisive: (1) there is no statutory provision giving the Secretary of Agriculture power to approve the acquisition of the assets of another corporation by a Capper-Volstead association; and (2) this transaction had not been authorized by the Secretary or anyone acting in his behalf (R. 494).

The Association's jurisdictional statement concedes (p. 16) that "no statute, to our knowledge, gives the Secretary of Agriculture specific authority to approve any acquisition at all", that is, that he is without statutory authority to approve any transaction which is within the prohibition of § 7, whether the acquiring corporation is or is not a Capper-Volstead association. This amounts to a concession that the last paragraph of § 7 is inapplicable to the Embassy acquisition.

As we understand, the Association also does not question the correctness of the other branch of the district court's ruling—its finding that the Secretary had never authorized, or purported to authorize, the Embassy acquisition. It appears to stand unchallenged that the Secretary did not go through the motions of doing an act not within any power vested in him by statute.

The Association appears to contend (Juris. St. 16–18) that § 7's last paragraph, read in conjunction with the phrase in the first paragraph that no corporation "subject to the jurisdiction of the Federal Trade Com-

mission" shall acquire the assets of another corporation, indicates an intent by Congress to exclude acquisitions by Capper-Volstead associations from the prohibitions of § 7. But the phrase "subject to the jurisdiction of the Federal Trade Commission" points to the opposite conclusion. The provisions for administrative enforcement of § 7 are found in § 11 of the Act, 15 U.S.C. 21. Section 11, as likewise amended by the Act of December 29, 1950, confers upon the Federal Trade Commission jurisdiction to enforce compliance with § 7 with respect to all corporations engaged in interstate commerce other than certain carriers and financial institutions.[20] Since a Capper-Volstead association is not within these exceptions, it is, under § 7, "subject to the jurisdiction of the Federal Trade Commission".

Possibly the Association will contend that, in view of the Secretary's lack of statutory authority to pass upon an acquisition of corporate assets by an agricultural cooperative, the reference to the Secretary in the last paragraph of § 7 is without meaning unless

[20] Section 11 as thus amended provides (64 Stat. 1126):

"Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce * * *."

the paragraph is interpreted as providing for a blanket exclusion of such cooperatives from the section. But the paragraph provides for exclusion only where there is both statutory power vested in the Secretary to authorize a transaction and actual administrative exercise of this power—"transactions duly consummated pursuant to authority given by the * * * Secretary". Both of these necessary elements would have to be ignored if the paragraph were to be construed as in and of itself excluding all agricultural cooperatives from § 7.

Pertinent legislative history, while sparse, is likewise contrary to the view that Congress intended to exclude all agricultural cooperatives from § 7. In the first place, the last paragraph of § 7 was deemed a very minor and unimportant aspect of the proposed amendment of §§ 7 and 11. The House and Senate reports on the bill make only casual reference to § 7's last paragraph. H. Rep. 1191, 81st Cong., 1st Sess., 6; S. Rep. 1775, 81st Cong., 2d Sess., 7. The reference to the Secretary may have resulted from views expressed in certain testimony given in hearings in the 80th Congress on H.R. 515.[21] The secretary of the National Cooperative Milk Producers Federation expressed the opinion that the proposed legislation might be interpreted as nullifying rights accruing to agricultural cooperatives under the Capper-Volstead Act, and requested that the following be added to the last

[21] This bill basically corresponded with the bill enacted in the 81st Congress, and § 7's last paragraph had the same provisions as the paragraph as later enacted, but it made no reference to the Secretary of Agriculture.

paragraph of § 7: "This Act shall not apply to farmer owned and controlled cooperative associations operating within the provisions of section 1 of the Act of February 18, 1922 [the Capper-Volstead Act]". Hearings Before Subcommittee No. 2 of the House Judiciary Committee on H.R. 515. 80th Cong., 1st Sess., Serial No. 3, 103–104.

Significantly, Congress did not adopt the language suggested by this witness, which would have taken agricultural cooperatives out of § 7, but simply included the Secretary of Agriculture among the agencies whose administrative action, pursuant to statutory authority, might exclude a transaction from § 7. Furthermore, the report of the House Judiciary Committee said with reference to the jurisdiction of these agencies that "there is no disposition to change the present arrangement regarding them". H. Rep. 1191, 81st Cong., 1st Sess., 6. The report of the Senate Judiciary Committee stated even more pointedly and directly (S. Rep. 1175, 81st Cong., 2d Sess., 7):

> The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, *it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess.* [Emphasis supplied.]

While the Congressional purpose in including the Secretary of Agriculture in the last paragraph of

§ 7 is thus not clear, there is no indication that Congress thereby intended to broaden the existing antitrust immunity of agricultural cooperatives under Capper-Volstead. Indeed, the Secretary may have been included merely to cover the possibility that the many statutes which he administers might have authorized him to approve some corporate acquisitions.

III. THE DISTRICT COURT'S JUDGMENT FAILS TO GRANT ADEQUATE RELIEF

In civil antitrust cases brought by the United States, this Court has repeatedly emphasized the critical importance of adequate relief. Upon this may depend whether "the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States,* 332 U.S. 392, 401. And the purpose of a decree in a case of this type is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (*ibid.*). Since the Government's civil antitrust cases are brought to this Court on direct appeal from the district court, without passing through the courts of appeals, the relief granted "has always had the most careful scrutiny of this Court." *International Boxing Club* v. *United States,* 358 U.S. 242, 253. While it is "peculiarly the responsibility of the trial court" to determine what decree provisions are sufficient to cure the ill effects of an antitrust defendant's illegal conduct, this Court has never treated the trial court's exercise of the power thus vested in it "as one of discretion, subject only to reversal for gross abuse". *United States* v. *U.S. Gypsum Co.,* 340 U.S. 76, 89. Rather the Court

has "felt an obligation to intervene in this most significant phase of the case" when it concludes that the provisions of the decree below are inappropriate or inadequate (*ibid.*).

Furthermore, the relatively cursory consideration given by the court below to the question of relief emphasizes the need in this case for careful appellate scrutiny and review. There was no separate hearing for the taking of evidence on relief. The two opinions holding the Embassy acquisition illegal directed counsel to submit proposed judgments (R. 496, 506), and the opposing parties did submit widely differing proposed judgments,[22] which the court considered at a hurried hearing.[23] Early in the hearing it said that it would adopt the Association's draft judgment as the basis for its decree,[24] and the judgment which it signed at the end of the hearing was this draft, with the interlineations and excisions made by the court during the course of the hearing (R. 539).

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[22] See Government's proposed judgment (R. 76–84). The Association's proposed judgment is not, as such, included in the printed record. The court's final judgment of January 22, 1959 (R. 85–87) represents the Association's proposed judgment, the italicized words being those added by the court and the words through which a line is drawn being those which it struck.

[23] At the hearing the court said (R. 527): "Gentlemen, we are spending an awful lot of time on this. I have a jury case on trial, and I interrupted it for this. Let's move along a little more expeditiously."

[24] The court said (R. 519): "Now, gentlemen, it seems to me that I ought to use the Defendant's draft as a basis for my decree. I rather like the form of the Defendant's draft anyway."

We set forth below the several respects in which the judgment, in our opinion, fails to provide sufficient safeguards to insure a divestiture which will result in establishment of an effectively competing independent dairy.

(1) *Assets to be divested.* In order to restore the Washington market to a state of effective competition, to "undo as near as may be the wrongs that were done" (*United States* v. *Griffith,* 334 U.S. 100, 109), Embassy must be divested from the Association as a viable business entity. The Government's victory in the court below will prove an empty one if Embassy is cast loose only to perish, or if no buyer for it can be found. In that event, the Association would retain the fruits of its unlawful conduct and independent farmers would continue to be foreclosed from the market.

The judgment requires the Association, within a year, to "dispose of as a unit and as a going dairy business all [Embassy] assets * * * tangible or intangible, which it acquired on July 26, 1954, and replacements therefor", and requires it, pending divestiture, to administer these assets in "good faith" so as to preserve them in "as good condition as possible" (R. 85–86).

The judgment should be modified so as to require the Association to divest all assets used, as of the date of disposition, in the dairy business conducted under the trade name "Embassy Dairy". The assets presently so used include those acquired from Embassy in 1954, new equipment purchased by the Association, assets which it acquired in 1957 from the Richfield-

Wakefield Dairy, and assets represented by the interim increase in Embassy's volume of business. Divestiture of Embassy in its present operating status is essential, not only to increase the likelihood of finding a purchaser, but also to make it possible for the new Embassy to develop into a significant independent competitive business. However, the court indicated that under its judgment the Richfield-Wakefield assets acquired by the Association and presently used in its Embassy business need not be disposed of unless they constitute "replacements" for assets acquired from Embassy (R. 521–522, 533–534), and it declined to rule whether the judgment would require divestiture of new equipment purchased by the Association and used in conducting its Embassy dealer business (R. 536–537).[25]

If the modern machinery and other assets added by the Association are not within the divestiture order, it is doubtful whether the Embassy assets could be reorganized into a company that would survive, much less compete effectively with the other well-established dairies. This is particularly critical because dairy technology and the population of metropolitan Washington have not remained static in the five-year period since the acquisition.[26] Nor would the Association be

[25] Compare this Court's statement in *International Salt Co.* v. *United States*, 332 U.S. 392, 400, that "it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur."

[26] Total fluid milk sold by Washington metropolitan area dealers increased from 567 million pounds in 1953 (R. 667) to 685 million pounds in 1957 (R. 675). During this period, Em-

adversely affected by the requirement that *all* assets currently used in the Embassy business be included in the sale of that business. Presumably the price received by the Association on the sale of Embassy would reflect the value of the assets purchased by the Association or acquired from Richfield-Wakefield and incorporated in the Embassy business.

(2) *Safeguard against inroads on Embassy's business.* The current volume of Embassy's business would be a material factor in its value to a purchaser and in the viability of Embassy following purchase. Indeed, the district court was of the opinion that operation by the Association of another dairy pending divestiture of Embassy would "impair Embassy", but declined to frame its judgment so as to guard against such impairment (R. 510). Likewise, the marketability of Embassy's assets and its ability to survive would be adversely affected if, immediately following divestiture, the Association were free to operate a dairy and recapture its Embassy customers. The judgment which the Government proposed would have banned the Association from engaging in the wholesale or retail distribution of fluid milk in the Washington area pending divestiture of Embassy and for a specified period following divestiture (R. 79). We submit that safeguards of this character clearly are required, and it might appropriately be left to the district court to determine the period of any post-divestiture ban against operating as a dealer in the Washington market.

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bassy's total annual business increased from 50 million pounds to 60 million pounds (*ibid.*).

(3) *Future acquisitions.* The Government's proposed judgment provided for enjoining the Association, for a specified period after entry of judgment, from acquiring any business consisting of sale or distribution of milk in the Washington market without (a) prior notice to the United States and, if it objected, (b) approval of the acquisition by the court upon a showing that it would not substantially lessen competition or tend to create a monopoly in the sale or distribution of fluid milk in that market (R. 82). The district court gave no explanation for its rejection of this provision, except for the general statement that "all" it "intended to do by way of relief was to order divestiture of the assets of Embassy Dairy * * * and a cancellation of the auxiliary contracts" (R. 507).

Since the Association already controlled about 86% of the milk supply in that market, any additional engrossing of that market by the Association necessarily would pose a serious anti-competitive threat. The record in this case demonstrates the difficulty of undoing a consummated acquisition in the dairy business. The district court found that the Embassy acquisition was made with the specific intent to eliminate competition. The development of Embassy as a strong independent competitive factor in the market might be seriously inhibited if the Association could quickly reenter that market by purchasing another dairy. Indeed, that possibility might deter prospective purchasers from Embassy. Finally, it must be borne in mind that the district court held that the

acquisition violated not only § 7 of the Clayton Act but also § 3 of the Sherman Act.

In these circumstances, we submit that it was appropriate to require, for a limited period after divestment,[27] that the Association should establish that adverse competitive effects would not flow from its acquisition of another dairy. Such a provision, of course, would not operate as a bar to any future acquisitions by the Association. It would merely, in a situation where adverse competitive effects are likely to result from any acquisition, shift to the Association the burden of proving the absence of competitive injury from a particular transaction, rather than requiring the Government to prove such injury in the first instance.

This type of antitrust relief has been held to be appropriate and necessary in other cases. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185–187; *Schine Theatres* v. *United States*, 334 U.S. 110, 130. We believe that it was equally appropriate and necessary in this case.

(4) *Visitation rights.* The district court's refusal to grant the Government visitation rights, as embodied in its proposed judgment (R. 83), is a particularly serious handicap in the present case since certain im-

[27] The Government's proposed judgment (R. 82) suggested a twenty-year period. Upon further consideration, we have concluded that a shorter period would probably be adequate to insure the development of Embassy as a strong independent competitive factor in the market. While the length of such period is a matter initially for the determination of the district court, we suggest that five years might perhaps be appropriate.

portant judgment provisions (pars. 5 and 6, R. 86) depend for their effectiveness upon the Association's compliance with a vague "good faith" standard. Without visitation rights, it will be extremely difficult for the Government to determine the Association's compliance with this and other aspects of the judgment. The mere filing of reports by the Association (R. 86, 522–523), and the Government's right to "make an application" to the district court for "examining books and papers" "[i]f there is any reason" therefor (R. 517), are not adequate substitutes for a visitation provision.

Whatever might be the justification for a denial of visitation rights in the exercise of the court's discretion as to the relief appropriate in the circumstances of the particular case, this was not the basis of denial here. The basis of denial here was that visitation rights are comparable to an unlawful search and seizure (R. 517). This, we submit, was error. In *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 726–728, this Court upheld visitation rights of the kind proposed in the instant case, and considered and expressly rejected (p. 727) objections grounded on the Fourth Amendment's unreasonable search and seizure provisions. See also *United States* v. *National Lead Co.*, 332 U.S. 319, fn. 4, at pp. 333–334.

CONCLUSION

The judgment of November 10, 1958, dismissing the cause of action based upon § 2 of the Sherman Act, should be reversed. The judgment of January 22, 1959, should be affirmed as to the adjudication that

the Association violated § 3 of the Sherman Act and § 7 of the Clayton Act but should otherwise be reversed. The cause should be remanded to the district court for further proceedings in conformity with the opinion of this Court.

Respectfully submitted.

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NOVEMBER 1959.

APPENDIX

The Act of July 2, 1890, 26 Stat. 209, as amended, known as the Sherman Act, provides in part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U.S.C. 1.]

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. [15 U.S.C. 2.]

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * * [15 U.S.C. 3.]

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the

Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *. [15 U.S.C. 4.]

The Act of October 15, 1914, 38 Stat. 730, as amended, known as the Clayton Act, provides in part as follows:

SEC. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [15 U.S.C. 17.]

SEC. 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime

Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. [15 U.S.C. 18.]

* * * * * *

SEC. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U.S.C. 25.]

The Act of February 18, 1922, 42 Stat. 388, known as the Capper-Volstead Act, provides:

SEC. 1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [7 U.S.C. 291.]

SEC. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition ask-

ing that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to the pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. * * * [7 U.S.C. 292.]

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